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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN C. BIERWIRTH, ROBERT G. FREESE, and CARL A. PALADINO,

Petitioners,

—against—

RAYMOND J. DONOVAN, Secretary of the United States Department of Labor,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 13, 1982

Questions Presented

1. May the trustees of an ERISA pension plan, during a tender offer for control of the employer-sponsor, purchase shares of the employer-sponsor where: (i) the plan is dependent upon the employer-sponsor for future funding; (ii) the trustees comply with the statutory provisions limiting purchases of securities of an employer-sponsor to 10% of the plan's assets; and (iii) the trustees have good reason to believe that the tender offer poses special dangers to the plan and that the shares of the employer-sponsor are a good investment at the price paid?

2. Did the Court of Appeals err in applying the traditional "prudent man" rule in assessing the conduct of the trustees where ERISA and its legislative history make plain that the applicable rule should be one which reflects the "special nature of employee benefit plans"?

Parties Below

The parties to this action in the Court below were:

Plaintiff-Appellee:

Raymond J. Donovan, Secretary of the United States Department of Labor.

Defendants-Appellants:

John C. Bierwirth, Robert G. Freese and Carl A. Paladino (Trustees of the Grumman Corporation Pension Plan).

Intervenors-Appellants:

Joseph W. Ullman, Lillian E. Baldissard, Rita V. Haffner, Anthony Pancella, Jr., Kathleen T. Chew and Benjamin L. Crews (Grumman Employees and Retirees covered by the Plan).

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion and order of the United States Court of Appeals for the Second Circuit, reported at 680 F.2d 263 and set forth in the appendix to this petition at (1A), affirmed the grant of a preliminary injunction against the Trustees of the Grumman Corporation Pension Plan (the "Trustees" of the "Plan"), who had, during a tender offer by The LTV Corporation ("LTV") for Grumman shares, decided not to tender Grumman shares previously purchased and to purchase additional shares. The Court reversed the District Court's appointment of an interim receiver to manage the Grumman shares owned by the Pension Plan (680 F.2d at 277; 31A). In an unreported

order filed June 18, 1982 in response to the Trustees' petition for rehearing, the Second Circuit modified some of the language of its opinion but otherwise denied the petition (32A-34A).

The opinion of the District Court is reported at 527 F. Supp. 86 and found in the appendix at (37A). The unreported order of the District Court is found in the appendix at (66A).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 10, 1982 (71A). Petitioner's timely motion for rehearing with a suggestion for rehearing *en banc* was denied on June 18, 1982 (32A-35A). This Court has jurisdiction by reason of 28 U.S.C. § 1254(1) (1976).

Statutory and Regulatory Provisions

Those portions of the statutes and regulations which are relevant to this petition (specifically, section 404 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1104 (1976) and section 407 of ERISA, 29 U.S.C. § 1107 (1976)) appear in the appendix at the end of this petition (1S-2S).

Statement of the Case

The Plan, like other pension plans covering 34 million American workers,[1] is a "defined benefit plan", a creature of statute which, like a common law trust has "trustees" and "beneficiaries" but in important respects (which are at the heart of this case) is radically different. Benefits are established by the employer-sponsor, not the trustees. Any

[1] American Council of Life Insurance, *1981 Pension Facts* 5.

shortfall on investments must be made up by the sponsor; conversely, any windfall, in the form of unanticipated appreciation in plan assets, inures to the benefit of the sponsor, whose required contributions are thereby reduced. In short, the vicissitudes of the plan's investment performance do not affect either the level of benefits granted under the plan or the plan's ultimate security except in the drastic and unusual circumstances of the sponsor's financial failure.

A tender offer for control of the plan's sponsor directly affects the future of the plan and its beneficiaries in a variety of important ways.[2] A one time investment gain, or loss, even a substantial one, may be of little meaning to the participants and beneficiaries in comparison to the range of potential consequences resulting from a change in sponsors. A new sponsor may change to a less conservative funding policy; it may be less generous in establishing and increasing benefits; it may, because of financial weakness, be unable to continue funding at all; and it may, subject to certain ERISA restrictions, terminate the plan or merge it with another plan, to the possible detriment of the plan's participants. The most important requirement for any pension plan is a financially healthy and benevolent sponsor.

The interdependent relationship between a plan and its sponsor motivated Congress (1) to permit officers of the sponsor to serve as trustees, ERISA section 408(c)(3), 29 U.S.C. § 1108(c)(3) (1976); and (2) to permit officer-

[2] A change in the identity of the employer-sponsor of an ERISA pension plan continues to be an increasingly frequent occurrence. Corporate merger activity in the United States increased by 27% in 1981 to 2,395 transactions as compared with 1,889 the prior year. Economics Division, Congressional Research Service, *Merger Tactics and Public Policy*, 97th Cong., 2d Sess. 14 (Comm. Print 1982).

trustees to invest up to 10% of the plan's assets in the securities of the employer-sponsor, ERISA section 407, 29 U.S.C. § 1107 (1976). Congress viewed investments in the sponsor's securities as fostering the "symbiotic relationship existing between the employer and the plan covering his employees", "desirable to the sound, efficient functioning of employee benefit plans" and "likely to be engaged in by fiduciaries of . . . all plans". S. Rep. No. 93-127, 93d Cong., 1st Sess. 31, 33 (1973).

With this background in mind, we turn to the brief period in the fall of 1981 when the Trustees of the Plan were faced with an unexpected tender offer for a controlling interest in the Plan's sponsor by an entity with the dubious distinction of having the tenth largest unfunded pension liability in the nation.[3]

A. *The Tender Offer and The Trustees' Actions*

The facts are simple and largely undisputed. On September 23, 1981, LTV announced its intention to make a tender offer for a controlling interest in Grumman Corporation ("Grumman"), the employer-sponsor of the Plan (370a).[4] The LTV tender offer was structured so as to remain open for the minimum period allowed by law, twenty business days, with the proration/withdrawal period expiring one minute after midnight on October 15 (835a). The Board of Directors of Grumman, after receiving the advice of its investment bankers that the offering price was inadequate and of its lawyers that the offer likely violated both the federal antitrust and securities laws, voted on September 25 to recommend to its shareholders that they

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[3] *Paper Gains in Covering Pension Fund Liabilities*, Business Week, August 9, 1982, at 70.

[4] Citation in the form "(....a)" are to the Joint Appendix in the Court below.

not tender their shares to LTV (372a; 418a). On September 28 Grumman initiated antitrust and securities act litigation against LTV which ultimately resulted in the abandonment of the tender offer.

The Plan had been a shareholder of Grumman for several years owning 525,025 shares (146a), well below the 10% limit of section 407. Since prior to the adoption of ERISA, Grumman officers had served as Trustees of the Plan (226a; 451a). Trustee Paladino was (and is) Chief Financial Officer of Grumman's principal subsidiary (448a) and Trustees Bierwirth and Freese were (and are) directors and respectively Chief Executive Officer and Chief Financial Officer of the parent corporation (414a; 369a-70a). Each of the Trustees had followed, and was familiar with LTV's activities and performance because it had long been, and was, one of Grumman's leading competitors in the aerospace industry (a fact which ultimately led to an antitrust injunction).

Nearly two weeks after the offer was announced and nine days before the proration/withdrawal period was to expire, and while Grumman's preliminary injunction motion against the offer was pending for decision, the Trustees met on the afternoon of October 7 to consider a response to the LTV offer (460a; 422a; 379a). Some decision on their part was required with respect to the 525,025 shares held by the Plan. Prior to the formal meeting, the Trustees had discussed the Plan's response to the LTV offer with one another and had expressed some of their concerns about its impact on the Plan (379a; 421a-29a; 455a-56a). They had also been urged by some of the Plan's beneficiaries to purchase more Grumman shares to impede the offer and protect the Plan.[5]

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[5] On September 30, three hundred members of the Grumman Retirees Club—all beneficiaries of the Plan—met to discuss the

The October 7 meeting commenced with a presentation by the Plan's legal counsel, John Mullan, of the responsibilities of the Trustees as fiduciaries under ERISA (424a; 463a; 388a). He advised them that they were obligated to act prudently and solely in the best interests of the beneficiaries and participants of the Plan (424a; 463a; 388a).

Each of the Trustees expressed somewhat differently his reasons for reaching the same conclusion at the October 7 meeting: that the LTV offer was not in the best interests of the beneficiaries and participants of the Plan. Freese testified that "I personally read everything that I could get my hands on that LTV had out in the public record. I was concerned about the underfunding of their pension plan" (427a). Paladino testified that he "was very much concerned [that LTV] would cease to improve or increase benefits as had been the history of the plan. Concerns were that in light of their own plan where they had some $225 million of [unfunded liabilities]" (463a-64a).

The Trustees were not the only ones who were concerned about LTV's unfunded pension liabilities. Seven days after the Trustees' meeting Judge Mishler was to hold that:

> "[A]ccording to financial statements filed with the SEC (Vol. III, Ex. 32), LTV has unfunded pension liabilities totalling $225,000,000 at December 31, 1980. This sum was not reported in the Offer to Purchase.
>
> "In view of the substantial amount of these liabilities and the important role of financial information in determining what action a shareholder should take in

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LTV offer and Trustee Bierwirth was invited to attend. The suggestion was made by several of the retirees that the Plan should purchase additional shares of Grumman and the group was "very vociferous" in its support of that idea. The retirees voted to spend their own money on advertisements expressing their opposition to the offer.

response to this tender offer, we find that the failure to include these significant liabilities is an omission of material fact." *Grumman Corp.* v. *LTV Corp.*, 527 F.Supp. 86, 103 (E.D.N.Y. 1981).

Freese also testified that "I was concerned about their very highly leveraged debt situation in the company, how that would be increased after the acquisition of Grumman" (427a). LTV had a staggering amount of debt outstanding, which would increase greatly if its acquisition of Grumman were successful. Prior to the tender offer, LTV's current liabilities and long-term debt amounted to $2.4 billion (761a), and LTV had arranged to borrow over $700 million more in connection with the tender offer. There was substantial doubt that, after a successful takeover by LTV, the new management would desire—or be able—to continue the Plan's favorable funding practices.[6] In light of LTV's enormous debt burden, the Trustees believed that there was a substantial risk that LTV might, at minimum, change Grumman's funding policies, resulting in substantially smaller future employer contributions to the trust and reduced security for the Plan participants (381a).

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[6] LTV's May 28, 1981 prospectus confirms the pessimistic view of LTV's financial condition held by the Trustees. Among the many unfavorable items are the following: (i) it had current liabilities of $1.1 billion and long-term debt of $1.3 billion (761a); (ii) it was the subject of eight class actions brought against it and its officers for violation of the federal securities law as a result of their manipulations of inventory and overstatement of income ($26.6 million) over an extended period in the mid-70's (743a-44a); (iii) before the close of 1982, it was required to make expenditures in excess of $200 million—an amount in excess of 150% of its earnings during the last fiscal year—to comply with environmental regulations (747a; 778a); (iv) it was the subject of a $30 million fraud claim brought by the then United States Department of Health, Education and Welfare (754a); and (v) it had unfunded pension liabilities in the amount of $225 million (772a).

Grumman had periodically increased benefits to participants (486a; 385a), something it had no legal obligation to do. The Trustees were also aware that Grumman annually contributed to the Plan the maximum amount that could be deducted under section 404 of the Internal Revenue Code, 26 U.S.C. § 404 (1976), as amended, and the Trustees typically employed prudently conservative actuarial assumptions (58a; 227a) which resulted in higher contributions by Grumman than would have been the case if less responsible assumptions were used. On a termination basis, the Plan's assets would have exceeded the amount necessary to provide all accrued benefits of Plan participants and beneficiaries (58a-59a).

Apart from their concerns about LTV, the Trustees realized that the long-term growth potential of Grumman was excellent. Freese, Grumman's Chief Financial Officer, had recently prepared five-year projections for the corporation (417a), which were discussed by the Trustees at the October 7 meeting (426a). The new Reagan budget, according to Freese, was going to have a dramatic positive effect upon Grumman's aerospace business, and he felt that the problems in the bus and hydrofoil businesses were largely behind Grumman (423a). Paladino considered himself and his fellow Trustees to be "the most knowledgeable of the financial outlook of Grumman, which was most favorable" (468a).

The Trustees found significant the opinion of Dillon, Read & Co. rendered to the Grumman Board of Directors only twelve days previously, that LTV's offering price of $45 per share was inadequate (426a-27a; 468a). The Dillon, Read opinion was bolstered by a Lehman Brothers Kuhn Loeb report issued two months before the tender offer projecting future earnings for Grumman that, at the current price-to-earnings ratios, would have Grumman

shares trading well above the tender offer price of $45 per share. Paladino described the Lehman Brothers' report as containing "very very glowing prospects [for] Grumman." (472a; *see also* 391a).[7]

The Trustees concluded that the Plan should not tender the shares previously acquired and should increase the Plan's investment in Grumman up to, but not exceeding, the 10% limitation of section 407 of ERISA, 29 U.S.C. § 1107 (1976). The Trustees requested Mullan to ensure compliance with all regulatory requirements (392a-93a; 407a; 430a) and an application for an exemption from Rule 10b-6, 17 C.F.R. § 240.10b-6 (1981), was granted by the SEC on October 9.

The Trustees deferred implementation of their decision to increase the Plan's investment in Grumman securities and met briefly on October 12 to decide whether and when to implement their decision (393a-94a; 474a; 431a-32a). Following that meeting, William Parmentier, the Plan's Investment Manager, was given authority to purchase up to 1,275,000 shares of Grumman common stock (394a; 147a).

On October 12, Parmentier purchased at prevailing market prices 958,000 shares of Grumman and purchased an additional 200,000 shares on October 13 (498a; 147a). The purchases were executed through Dillon, Read at normal brokerage commissions rates (500a). No other investments were liquidated to pay for the shares (500a); the purchases were financed entirely from cash or cash equivalents (379a; 500a). The price for the shares ranged from $36 to $39¾ per share (147a).

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[7] The prospects for Grumman's earnings continue to be glowing. *See* Magnet, *Grumman's Comeback*, Fortune, Sept. 20, 1982 at 62, 72 ("The underlying value LTV saw in Grumman is no illusion . . . [Recent developments in its aerospace business] promise a stretch of prosperity such as Grumman hasn't seen in years.").

While the market price of the stock dipped to the mid-20's following an abandonment of the tender offer, on September 7, 1982, the stock closed on the New York Stock Exchange at $38½ per share, most of the gain having occurred during a falling market.

B. *The Proceedings Below*

The tender offer came to an abrupt halt on October 14, 1981 when the District Court preliminarily enjoined LTV from proceeding with its offer because it violated the antitrust laws and because LTV had failed to disclose in its tender offer documents, *inter alia*, the massive unfunded liabilities of its pension plans, 527 F.Supp. 86 (E.D.N.Y. 1981). On October 19, the D.O.L. filed suit (11a-27a).[8] Subsequently, the Court of Appeals affirmed the antitrust injunction, 665 F.2d 10 (2d Cir. 1981), and the tender offer was abandoned.

On the return date of its motion for a preliminary injunction and the appointment of a receiver, the D.O.L. offered no live witnesses. With the consent of the Trustees, the motion was submitted on the basis of documentary evidence (mostly public filings) and the transcripts of four depositions taken by the D.O.L., two depositions of D.O.L. officials taken on behalf of the Trustees, several affidavits with exhibits and a stipulation of certain background facts (98a-99a).

Also on the return date, a group of Plan participants applied for and were granted leave to intervene in opposition to the D.O.L.'s motion (68a; 97a). They presented to the District Court petitions which had been spontaneously circulated and over a period of a few days signed by over

[8] The basis for federal jurisdiction is section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1). Moreover, the D.O.L.'s claim arises under the laws of the United States, 28 U.S.C. § 1331.

18,000 of the 22,000 participants in the Plan expressing their strong support for the actions of the Trustees and their disapproval of the relief sought by the D.O.L. (87a-88a). The intervenors' position was based on their support and sympathy for the action which the Trustees had taken and on the fear that the court-appointed receiver would act "according to the short-term dictates of stock market prices and bottom-line fund market valuation rather than the long range viability of the fund." (92a)

On December 3, 1981 the District Court entered an order preliminarily enjoining the Trustees from buying, selling or taking any action with respect to Grumman shares held by the Plan which was followed by an order on January 11, 1982 continuing the injunction and ordering the appointment of a receiver for the Grumman shares.[9] On May 11, 1982 the Court of Appeals affirmed in part and reversed in part, concluding that the appointment of a receiver was unwarranted. The Court of Appeals reached this result, even though (i) it accepted the fact that the Trustees were "honestly convinced" that the tender offer posed "special dangers" to the Plan (680 F.2d at 276; 29A); and (ii) there was no evidence of potential harm to the Plan in the absence of an injunction.[10]

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[9] The injunction was granted despite the fact that from September 30, 1981 to November 30, 1981, the period covering the alleged paper losses to that date arising out of the purchases at issue, the Plan experienced a net unrealized gain on investments of $26 million, even after taking into account the paper loss on the Grumman stock purchased in October. Moreover, subsequent to the purchase of the Grumman stock the assets of the Plan were nearly $100 million greater than the amount which would be needed to pay all benefits if the Plan were terminated (226a).

[10] Indeed, the Court of Appeals noted that "[t]he financial integrity of the trustees is not questioned, as is demonstrated by the [district] court's willingness that they continue to act as such with respect to more than 90% of the Plan's assets [*i.e.*, assets other than shares of the employer-sponsor]." (680 F.2d at 276-77; 31A).

Reasons Why the Writ Should Be Granted

The United States Department of Labor (the "D.O.L.") described the appeal as raising "a policy question of truly national significance" (D.O.L. Br. p. 2) and the Second Circuit's opinion notes that "the question here at issue can arise for other companies." (680 F.2d at 270; 16A). This policy question of national significance has never before been addressed by this or any other Court.

The important policy question at the heart of this case is whether, in making investment decisions, officer-trustees may consider only market performance data or whether they may consider other economic consequences to the plan —in this case, the effect of a change in sponsors resulting from a tender offer. The Second Circuit's opinion answers the question by suggesting that "perhaps, after the events of late September, resignation was the only proper course" (680 F.2d at 276; 29A)[11] and by imposing on the Trustees' actions an unprecedented standard of review which is wholly unrealistic particularly in the context of a fast-moving hostile and contested tender offer.[12]

The threat of a draconian sanction encourages trustees either to avoid their responsibilities by doing nothing—even though affirmative action is strongly in the interest of the plan's participants—or by resigning at a time when

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[11] Elsewhere the Court observes that "[t]here is much to be said for the Secretary's argument . . . that the only proper course was for the trustees immediately to resign. . . ." (680 F.2d at 271; 19A-20A).

[12] Among other things the Court faulted the Trustees for not having a longer meeting, not hiring independent counsel (even though it identified no legal issue on which the Trustees were inadequately advised) and failing to secure investment advice beyond that available from Dillon, Read and the Lehman recommendation, even though such advice would have been plainly redundant.

their informed investment decisions are greatly needed by the plan, and turning the plan's management over to uninformed strangers ill-equipped to cope with such a situation in a prudent manner. Such a result is plainly contrary to the intention of Congress and certain to have a chilling effect upon trustees, who in the future are confronted with threats of this kind to the well-being of the pension plans they serve.

A. *The "Symbiotic Relationship" Between a Plan and its Sponsor*

The fundamental error in the Second Circuit's opinion is its failure to recognize and accept the conscious choice of Congress to foster and facilitate the mutually dependent relationship which inevitably exists between a plan and its sponsor. ERISA specifically allows corporate officers and employees, and even the corporation itself, to act in a fiduciary capacity with respect to an ERISA-governed pension plan maintained by the corporation, ERISA section 408(c)(3), 29 U.S.C. § 1108(c)(3) (1976). Indeed Congress recognized that the corporation or its officers and employees would frequently be serving as fiduciaries. *See, e.g.*, S. Conf. Rep. No. 93-1090, 93d Cong., 2d Sess. 297, 312 (1974).

It was with this mutual dependency in mind that Congress adopted section 407 authorizing trustees to invest up to 10% of plan assets in the sponsoring employers' securities. The 10% rule was the subject of considerable debate in Congress. Bills before the House and Senate during the 93d Congress included a broad range of options—from a complete bar to such purchases, a 5 percent rule and a 7 percent rule to the ultimate result embodied in section 407, the 10 percent rule. *See, e.g.*, S. 4, 93d Cong., 1st Sess. § 15(c)(4)(A) (1973) (10% rule); H.R. 2, 93d Cong., 2d Sess. § 15(b)(2)(A) (1974), as *reprinted in* 121 Cong. Rec.

S. 2631, S. 2611 (daily ed. Mar. 4, 1974) (7% rule); Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., II *Legislative History of the Employee Retirement Income Security Act of 1974* (Comm. Print 1976) 1727 (5% rule) (hereinafter cited as "II *Leg. Hist.*") (5% rule); II *Leg. Hist.* 1615 (0% rule).

In the midst of this controversy, the D.O.L. argued in favor of allowing a plan to invest up to 10% of the plan's assets in the employer's securities, not necessarily as the best investment available (determined on the basis of a purely financial analysis), but "in recognition of the symbiotic relationship" between the employer and the plan:

> "Especially significant among the expressly allowed transactions is that which permits, in most types of plans, investment of up to ten percent of the fund assets in securities issued by the employer of the employees who are participants in the plan. Since such an employer will often be an administrator of his plan, or will function as a trustee or in some other fiduciary capacity, this provision creates a limited exception to the listed proscription against self-dealing. The exception is made in recognition of *the symbiotic relationship* existing between the employer and the plan covering his employees." *Private Pension Plan Reform: Hearings Before the Subcomm. on Private Pension Plans of the Senate Comm. on Finance*, 93d Cong., 1st Sess. 446 (1973) (statement of Department of Labor) (emphasis supplied).

The views of the D.O.L. on the ten percent rule ultimately prevailed in Congress and section 407 in its present form was enacted.[13]

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[13] The Senate Committee on Labor and Public Welfare adopted and repeated as its own the above-quoted remarks of the D.O.L. S. Rep. No. 93-127, 93d Cong., 1st Sess. 33 (1973).

Implicit in the phrase "symbiotic relationship" is the notion of "mutual cooperation" and "mutual benefit". *Webster's Third New International Dictionary of the English Language* 2316 (1961). In fact, the word "symbiosis" is generally "restricted to a *dependent relationship* that is *beneficial* to both participants." *The New Columbia Encyclopedia* 2672 (4th ed. 1975) (emphasis added).[14] Aware of this natural interdependence and beneficial interaction between an employer and its pension plan, Congress rejected a prohibition of plan purchases of employer securities, and expressly permitted up to 10% of the plan assets to be invested in the employer's securities.

The Second Circuit's opinion quotes the "symbiotic" language from the legislative history (680 F.2d at 271; 18A) but dismisses section 407 and the accompanying legislative history by misconstruing the argument advanced by the Trustees:

> "[The Trustees] argue . . . that, despite the words 'sole' and 'exclusive', such officers or directors do not violate their duties by following a course of action with respect to the plan which benefits the corporation as well as the beneficiaries.
>
> "We accept the argument but not the conclusion which appellants seem to think follows from it. Although officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interests of participants and beneficiaries simply because it incidentally benefits the corporation

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[14] *See also Webster's New World Dictionary of the American Language* 1442 (2d ed. 1976) ("1. *Biol.* the intimate living together of two kinds of organisms, esp. where such association is of mutual advantage. . . . 2. a similar relationship of mutual interdependence between persons or groups.").

or, indeed, themselves, their decisions must be made with an eye single to the interests of the participants and beneficiaries." (680 F.2d at 271; 19A).

This ignores the true thrust of the argument on which the Trustees rely. It has never been their position that section 407 merely allows investments which happen "incidentally" to benefit the employer-sponsor. Rather the argument is (and the legislative history and the decision in *Withers* v. *Teachers' Retirement System*, 447 F.Supp. 1248 (S.D.N.Y. 1978), *aff'd mem.*, 595 F.2d 1210 (2d Cir. 1979), we submit, bear it out) that trustees may act with the "eye single" which section 407 requires even though their investment of up to 10% of the plan's assets in the sponsor's stock is not otherwise justifiable on its investment merits,[15] where they believe, with good reason, that there is a net benefit (perhaps not quantifiable) to the participants and beneficiaries, flowing from the impact of the purchase on the fortunes or affairs of the sponsoring organization. The Trustees saw precisely such a benefit here.

The 10% limit and ERISA's endorsement of corporate officers serving as trustees, we submit, demonstrate that officer-trustees should be permitted to make decisions to invest in, tender or sell the sponsor's securities on behalf of the plan (up to the 10% limit), even though the corporation, independently, has an interest in the action they take, and that a court will only rarely be justified in second-guessing them. These judgments, involving as they do both investment evaluations and relationships between the company and the plan reflecting the "symbiosis" re-

[15] Of course, this Court need not go so far on the facts of this case because the Trustees had ample reason to conclude that the Grumman stock was a good, long-term investment (860a; *see also* 417a; 468a; 426a-27a) (and the subsequent price performance of the Grumman stock has borne out their judgment).

ferred to by Congress, should be made by Trustees familiar with the company's affairs rather than by the courts. The persons who occupy these important posts—dealing as they do on a daily basis with the welfare of the companies they serve and their stockholders and employees—require practical guidance in the discharge of their obligations, not a Sword of Damocles which is more promotive of hesitation and inaction than of the responsible and timely making and implementation of difficult decisions requiring the application of all of their knowledge and expertise. The 10% rule says, in effect, that, so long as no more than 10% of the plan's assets are committed to the sponsor's stock, the corporate fiduciaries can be trusted to make judgments with respect to that investment without an intrusive judicial supervision. As Senator Taft said in the course of the legislative debate: "the 10-percent figure would provide an adequate safeguard against self-dealing." II *Leg. Hist.* 1848.

B. *The "Prudent Man" and "Exclusive Purpose" Rules*

The Court's opinion erroneously described the duty of the Trustees as that of "the traditional 'prudent man'" (680 F.2d at 271; 18A). The Conference Committee's Report on ERISA took pains to note that:

> "[t]he conferees expect that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans." H. R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess (1974).

The significance of this comment was emphasized in an article, Note, *Fiduciary Standards and the Prudent Man Rule under the Employment Retirement Income Security Act of 1974*, 88 Harv. L. Rev. 960 (1975). The article points out that because of the unique nature of a "defined

benefit plan" "the central problem shaping the development of common law rules—the tension between the investment goals of the income beneficiary and the remainderman—need not be faced by pension plan fiduciaries", *id.* at 967. The authors also note that "unlike the typical private trust which receives capital only at its inception, private pension plans can expect regularly to receive new funds, freeing the trustee from liquidity pressures. . . ." *Id.* at 968. The Court's opinion fails to perceive, we submit, the central importance to the Plan of the financial well-being of the sponsor.

In determining what is prudent and what is in the interests of the participants and beneficiaries of the Plan, the Trustees are not limited to short-term market performance statistics and may consider the overall impact of the transaction on the Plan. The broad range of factors which a trustee may consider is reaffirmed by the D.O.L.'s regulations under ERISA section 404(a)(1)(B), which specifically provide that fiduciaries are "not necessarily limited to . . . taking into consideration the risk of loss and the opportunity for gain. . . ." 29 C.F.R. § 2550.404a-1 (b)(2) (1981). Thus, while loss and gain must be considered, other factors may be considered as well:

> "The concept of 'benefits,' however, need not be limited to payments that a participant or beneficiary would receive upon retirement, *i.e.*, pure economic return to an investment. It is arguably broad enough to include numerous types of positive returns, *e.g.*, job security and improved working conditions. Thus, this provision can be construed to allow a trustee to promote nontraditional objectives at the expense of adequate return and corpus safety if the investment produces a direct 'other benefit.'" Ravikoff & Curzan, *Social Responsibility in Investment Policy and the*

Prudent Man Rule, 68 Calif. L. Rev. 518, 532-33 (1980).[16]

The Trustees' actions here did not go nearly as far as the authors of the article suggest would be the full breadth of a trustee's lawful discretion: (i) these Trustees considered only the effect of a threatened change in sponsor on the benefits payable under the Plan and the security of those benefits, not on working conditions or job security; and (ii) they had solid ground to believe that in the long-term there was no "expense" to adequate return on investment or corpus security.

In this case, only economic considerations were taken into account by the Trustees: (i) the economic impact on the Plan of a change in sponsors; and (ii) the long-term prospects of Grumman stock. No showing has been made in this case that anything which these Trustees did, or failed to do, placed their actions outside the proper exercise of their responsibility. The record simply does not show that the hiring of another investment advisor would have been other than redundant, that there were fine points of ERISA as to which the advice of outside counsel was mandated or that a further factual investigation of the company with the tenth largest unfunded pension liability in the nation was necessary.

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[16] *See also ERISA Improvements Act of 1979: Hearings on S.209 Before the Senate Committee on Labor and Human Resources*, 96th Cong., 1st Sess. 7 (1979) (introductory remarks):

"[T]he framework of ERISA's present fiduciary responsibility rules, requiring that plan fiduciaries act 'solely in the interest' of plan participants and beneficiaries, 'for the exclusive purpose' of providing plan benefits and defraying administrative costs, and in a prudent fashion, *permits taking noneconomic issues into consideration when investment decisions are being made.*" (emphasis added).

CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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